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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1734

SACRAMENTO COCA-COLA BOTTLING CO., INC., a California corporation; SACRAMENTO COCA-COLA BOTTLING CO., INC., a California corporation, d/b/a C-C Concession Co.,

Petitioner,

vs.

CHAUFFEURS, TEAMSTERS, AND HELPERS, LOCAL No. 150, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association; JOINT COUNCIL OF TEAMSTERS No. 38, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, an unincorporated association; CARL J. OLSEN and M. S. VIDAVER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

Respondents respectfully submit that this Court is without jurisdiction under Rule 19(1)(b), Supreme Court Rules in that none of the reasons therein set

forth warranting review on certiorari are present in the instant case.

QUESTION PRESENTED

The question before this Court is properly stated as follows:

Does a plaintiff waive his right to appeal a district court ruling dismissing for failure to state a claim upon which relief can be granted two claims from among six pleaded in the complaint, when plaintiff does not restate the claims previously dismissed in an amended pleading filed subsequent to the district court ruling?

Petitioner contends that an additional question is presented regarding federal preemption as enunciated in *San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236. (Petition, p. 5)

Since the court below specifically did not pass upon the question of whether the "Federal Labor Act" preempted the tort law of California under the facts of this case, respondent submits no question with respect to such applicability can be before this Court.

STATEMENT OF THE CASE

Petitioners, plaintiffs below, each pleaded three identical causes of action arising from the same set of facts. The complaint alleged that respondents conduct violated Section 303 (29 USC § 187) of the National Labor Relations Act; Sections 1 and 4 of the Sherman

Act (15 USC §§1, 4), Section 4 of the Clayton Act (15 USC §12) as amended by the Robinson-Patman Act (15 USC §§12-27); and the common law of California.

Respondents moved to dismiss the common law conspiracy claims and the anti-trust claims for failure to state a claim upon which relief could be granted. (Tr. pp. 94-109) The court granted the motion with respect to the conspiracy claims. (Petition Appendix pp. 1-8) Petitioner thereafter filed an amended complaint which eliminated the common law conspiracy claims. (Tr. pp. 290-308)

Respondents thereafter filed a motion for judgment on the pleadings with respect to the anti-trust claims. This motion was granted by the court. (Petition Appendix, pp. 9-11)

Petitioner then moved for final judgment on both orders pursuant to Federal Rules of Civil Procedure Rule 54(b). (Tr. pp. 363-372) The motion was granted and final judgment entered in favor of respondents with respect to the anti-trust claims and the common law conspiracy claims. (Tr. pp. 374-375)

The Court of Appeals held that petitioner waived its right to appeal the district court's decision dismissing the common law conspiracy claims by not repleading said claims in their amended complaint. The petition before this Court is filed with respect to this holding.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS.

The Court of Appeals held that petitioners waived their right to appeal the district court's dismissal of their common law conspiracy claims by failing to include these claims in their third amended complaint. The court cited its decision in *Loux v. Rhay* (Cir. 9, 1967) 375 F.2d 55 as authority for so doing. The result is consistent with a well established line of Ninth Circuit cases. It is also in accord with the decisions reached by the Fifth, Sixth, Seventh, Eighth and Tenth Circuits. See: *Cedillo v. Standard Oil Company of Texas* (Cir. 5, 1958) 261 F.2d 443; *Grubbs v. Smith* (Cir. 6, 1936) 86 F.2d 275, *cert. den.* 300 U.S. 658, 57 S. Ct. 437, 81 L. Ed. 867; *Lubin v. Chicago Title and Trust Company* (Cir. 7, 1958) 260 F.2d 411; *Ericson v. Slomer* (Cir. 7, 1938) 94 F.2d 437; *Nisbet v. Van Tuyl* (Cir. 7, 1955) 224 F.2d 66; *Brown Sheet Iron & Steel Co. v. Maple Leaf Oil & Refining Co. Limited* (Cir. 8, 1934) 68 F.2d 787; *Aetna Life Ins. Co. v. Phillips* (Cir. 10, 1934) 69 F.2d 901; and *Leggett v. Montgomery Ward & Co.* (Cir. 10, 1949) 178 F.2d 436.

Petitioners cite *Blazer v. Black* (Cir. 10, 1952) 196 F.2d 139 as standing for the proposition that a ruling striking a vital blow to a party's claim or defense is not waived for purposes of appeal by filing an amended pleading. (Petition pp. 19, 20) However, the comments of Judge Murrah quoted in the Petition at page 20 were in no manner the basis for the decision

reached by the court; for immediately following the remarks quoted Judge Murrah stated:

> But, be that as it may, we need not decide whether the trial court erroneously sustained the motion to strike or whether appellant waived his right to question such ruling by pleading over, for we are certain that the second amended complaint, on which he went to trial, sufficiently stated a claim based upon a fraudulent scheme under color of a fiducial relationship, and evidence bearing upon that scheme from its inception to its consummation was relevant and admissible under the issues raised by the pleadings. [*Blazer v. Black* (Cir. 10, 1952) 196 F.2d 139, 144]

The rule in the Tenth Circuit on this question is set forth in the *Aetna Life Ins. Co. v. Phillips, supra,* holding that when a demurrer has been sustained to a party's pleading, and he elects to plead over, he waives any error in the ruling on demurrer. The court notes the rule has its basis in the fact the amended pleading supercedes and takes the place of the original pleading.

Petitioner states that Judge Murrah's language in *Blazer v. Black, supra,* is "fully supported" by the commentators, citing 3 Moore's Federal Practice, Section 15(8) and 41 Am. Jur. Pleading Section 400.

Judge Murrah's dicta cited *Williamson v. Liverpool and London and Globe Ins. Co.* (Cir. 8, 1905) 141 F. 54 as his sole authority. Am. Jur., supra, and Moore's, supra, cite no authority beyond *Williamson v. Liver-*

pool, supra, and *Blazer v. Black, supra.* Thus, we have petitioner urging as the general rule a position set forth in a single 1905 case by the Eighth Circuit, and a position which may no longer be the rule in that Circuit.

In *Brown Sheet Iron & Steel Co. v. Maple Leaf Oil and Refining Co. Limited* (Cir. 8, 1934) 68 F.2d 787 defendants interposed certain motions and demurrers which resulted in the court directing amendment of the complaint. Defendants answered the amended complaint. On appeal the court found no need to give attention to the earlier pleadings ". . . nor any of the rulings with respect thereto. They were superceded by the second amended complaint. . . ." [68 F.2d 787, 788] The opinion makes no reference to *Williamson v. Liverpool, supra;* but the result is so clearly contrary to that reached in *Williamson* to warrant the conclusion that *Williamson* is no longer the law of the Eighth Circuit.

Petitioner's contention that *Loux v. Rhay, supra,* is consistent with *Blazer v. Black, supra,* is without merit. The court in *Loux* dismissed the complaint for failure to state a claim upon which relief could be granted, a ruling which patently struck a "vital blow" to plaintiff's cause of action; yet the court held that by amending his complaint, plaintiff waived any error in the court's ruling on the original complaint. Nor was the court of diverse opinion on this point, Judge Hamley in his dissent notes his agreement with this rule:

> Notwithstanding the fact that, in my opinion, the district court erred in dismissing the original complaint . . . this is not ground for reversal. As indicated in the majority opinion, Loux acquiesced in such dismissal by filing an amended complaint. [375 F.2d 55, 60]

Similarly, Petitioner's contention that *Grubbs v. Smith, supra,* is consistent with the rule of *Blazer v. Black, supra,* is incorrect. In *Grubbs* a question was raised with respect to whether the lower courts action was pending on all plaintiffs pleadings or only upon an amended petition. After noting that plaintiff's intention to have only the amended petition before the court, the Court of Appeals stated:

> But whatever the plaintiff's intention, as a matter of law the amended and substituted petition superceded the prior pleadings in the case. *Ferguson, Ex'r v. Meredith,* 1 Wall. (68 U.S.) 25, *Brown Sheet Iron, etc. Co. v. Maple Leaf, etc. Co.* (C.C.A. 8) 68 F.2d 787; *Aetna Life Ins. Co. v. Phillips* (C.C.A. 10) 69 F.2d 901; *Bedell v. Baltimore & O.R. Co.* (D. C. E. D. Ohio) 245 F. 788. [86 F.2d 275]

The present case is clearly on all fours with *Loux v. Rhay, supra,* and the cited cases which are consistent with *Loux.* When its conspiracy claims were dismissed, Petitioner had the option of repleading them in the amended complaint subsequently filed. By so doing the claims would have remained before the Court on appeal as part of petitioner's complaint. By failing to include these claims in the subsequently filed

amended pleading, petitioner removed these claims as part of the subject matter of their action. Petitioner's action herein is analogous to that of plaintiff in *Zimmerman v. Emmons* (Cir. 9, 1955) 225 F.2d 97 who filed an amended complaint during the course of trial in which he named as defendant but one of the many theretofore involved. The defendant so named answered the amended complaint. Plaintiff's conduct had the effect of dismissing the action with respect to the other defendants. So here Petitioner's action of unnecessarily deleting the conspiracy claims from its amended complaint evidenced his concurrence in the district court's ruling. The superceding complaint sans the conspiracy claims leaves nothing before the court with respect to such claims.

II. THE ABSENCE OF CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT SUPPORTS DENIAL OF THE PETITION.

The court should not exercise its discretion to grant certiorari in the present case since the common law conspiracy claims are clearly pre-empted by federal labor law.

Petitioner in claims one and four of complaint alleges an unfair labor practice under Section 8 of the National Labor Relations Act. (Petition Appendix A, p. 5) The description of the conduct alleged in the conspiracy claims employs the same generalities as the Section 303 claims. There is nothing in the complaint to support a conclusion that any different

activity was involved. (Petition, Appendix A, p. 5) Petitioner concedes the conduct alleged in its conspiracy claims is the same conduct alleged in the Section 303 claims to be violative of Section 8(b)(4) of the National Labor Relations Act. (Petition, p. 26) No actual or threatened violence was charged in the Section 303 claims. (Petition, p. 27)

Teamsters Union v. Morton (1964) 377 U.S. 252 is controlling. In *Morton,* the Supreme Court affirmed an award of compensatory damages for a Section 303 violation but vacated an award of compensatory and punitive damages based upon the common law of Ohio, holding a court is confined to the provisions of the "Federal Act" in awarding damages for a union's peaceful strike conduct *vis-a-vis* a secondary employer. (377 U.S. 252, 257)

Mine Workers v. Gibbs (1966) 383 U.S. 715 refined *Morton* in holding the permissible scope of state remedies in the area of Section 303 conduct to be confined to the direct consequences of violence or threats thereof and not to extend to consequences resulting from associated peaceful picketing or other union activity. (383 U.S. 715, 729) The state tort alleged was a conspiracy to "maliciously, wantonly and willfully" interfere with Gibbs contractual relations. Since the complaint was not limited to interference "by violence", the Court held the complaint failed to keep the conspiracy claim within any proper bounds. (383 U.S. 715, 733) No limitation to interference by violence is contained in petitioners conspiracy claims; they likewise exceed any proper bounds.

Price v. United Mine Workers (Cir. 6, 1964) 336 F.2d 771; *Gulf Coast Bld. & Const. Tr. Coun. v. F. R. Hoar & Son, Inc.* (Cir. 5, 1967) 370 F.2d 746; and *Smith v. American Guild of Variety Artists* (Cir. 8, 1965) 349 F.2d 975 cited by petitioners are all cases involving physical violence, physical destruction of property or threats thereof. Thus, these cases are well within the rule permitting state court remedies established by *Morton* and *Gibbs*. These cases, therefore, provide no support for permitting a state court remedy in the present case.

Linn v. United Plant Guard Workers (1966) 383 U.S. 1953 and *International Association of Machinists v. Gonzales* (1958) 356 U.S. 617 are inapposite since each involved conduct of "peripheral concern" to the National Labor Relations Act; a contention which can scarcely be made with regard to Section 303 type conduct.

CONCLUSION

Respondents respectfully request that the court issue an order denying the application for a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated, July 16, 1971.

Respectfully submitted,

FLORIAN J. BARTOSIC,

ROBERT LE PROHN,

Attorneys for Respondents.